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March 19, 2012

VIA OVERNIGHT MAIL

Lester Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street N.W., Room 11602
Washington, DC 20570-0001

Re: Flex-N-Gate Texas, LLC
Case Nos. 16-CA-27742 and 16-CA-27790 (Combined)

Dear Mr. Heltzer,

I received a telephone call today from your office asking us to send another copy of Flex-N-Gate's Brief in Support of Exceptions to Administrative Law Judge's Decision. I have enclosed a file-stamped copy, originally filed with your office via hand delivery on January 25, 2012. If you have any questions or need anything further, please do not hesitate to contact me.

Very truly yours,

John T.L. Koenig

JTLK/tlw

Enclosure

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW	)	
Charging Party,	) **Case Nos.**	**16-CA-27742 and 16-CA-27790**
FLEX-N-GATE TEXAS, LLC	)	
Respondent.	)	

RESPONDENT FLEX-N-GATE'S
BRIEF IN SUPPORT OF EXCEPTIONS TO ALJ'S DECISION

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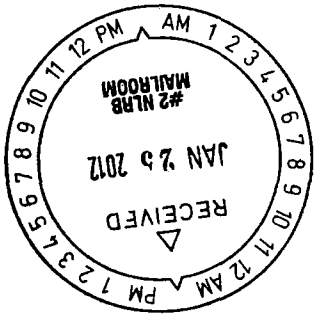

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I. Statement of the Case

Respondent Flex-N-Gate Texas, LLC ("Flex-N-Gate" or the "Company") is an automotive supplier. [ALJ 3].[1] Its facility at issue in Arlington, Texas, is a sequencing plant that services General Motors (GM) at its nearby sport utility vehicle (SUV) assembly plant. [ALJ 3]. Flex-N-Gate pre-assembles front and rear fascias in the exact order (sequence) that vehicles are being built by GM. [Tr. 88].[2]

The primary issue in this case centers on a reduction in force of three team leaders at the facility. [ALJ 2]. This reduction was part of an ongoing effort to align the staffing at the Arlington plant with comparable facilities throughout the Company. [GC 30].[3] The Company follows "lean manufacturing" principles, which the Arlington plant manager explained, means simply, "You want to make sure that your manpower you're running, that you're running only the manpower that you need to support your customer." [Tr. 416].

This process started long ***before*** the union ever filed their petition for election, as at least two other team leader positions and three salaried positions had been eliminated as part of this ongoing process ***before*** the election petition was ever filed. [GC 30], and the Company continued to make further reductions ***after*** the terminations at issue in the case. [Tr. 372; 417-18]. The facility had not hired a new, permanent employee at the plant for nearly a year and a half before the hearing in this matter. [Tr. 432; GC 17].

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1 Citations to "ALJ" followed by the page number are to the ALJ's Decision in this case dated December 28, 2011.

2 Citations to "Tr." followed by the page number are to Official Report of Proceedings (transcript) from the hearing in this matter.

3 Citation to "GC" followed by an exhibit number is to General Counsel's exhibits introduced in the hearing in this matter.

Regarding the specific terminations at issue in the case, the uncontested evidence showed that the ultimate decision maker decided there were too many team leaders at the plant before the election petition was filed. [Tr. 334; 380; GC Ex. 31, Tr. 397]. The three employees identified in the charge were not singled out based on engaging in alleged protected activity. Rather, the Company based its staffing reduction decision on legitimate, nondiscriminatory reasons – seniority and redundancy. [Tr. 444; ALJ 4]. The Company eliminated the two least senior production team leaders, one per shift, and eliminated the IT team leader on second shift because there is already an IT manager, much larger operations are staffed with just one IT employee, and the Company had already eliminated the first shift IT team leader. [Tr. 416-17; 431].

The evidence showed the General Counsel failed to meet its burden of proof that the decision maker at issue was aware that the three had engaged in protected activity. The General Counsel also failed to prove any link between the alleged protected activity and the ultimate reduction in force. The Company demonstrated it would have taken the same steps to reduce its workforce regardless of whether the employees engaged in protected activity. In any event, the evidence showed that the three team leaders were "supervisors" as defined in the Act and therefore not entitled to protection.

Finally, the Company acted lawfully and appropriately throughout the election, properly exercised its free speech rights and communicated with employees at all times without threat or coercion.

II. Questions Presented

1. Whether the ALJ erred in applying the *Wright Line* standard by failing to require the General Counsel to carry the burden of proof. [Exceptions 52-60, 66-68, 113, 109-110].

2. Whether the ALJ erred in imputing alleged knowledge of protected activity from lower level managers to the ultimate decision maker. [Exceptions 5, 38-44, 52-60, 66-68, 113, 109-110].

3. Whether the ALJ erred in concluding that "the Acting General Counsel had no duty to make such inquiry" into whether the ultimate decision maker had knowledge the three alleged discriminatees engaged in protected activity. [Exceptions 38-44, 52-60, 66-68, 113, 109-110].

4. Whether the ALJ erred in presuming knowledge of protected activity on the part of the ultimate decision maker based solely upon the number of employees working at the facility. [Exceptions 1, 38-44, 49-51, 56

5. Whether the ALJ erred in concluding that there are approximately 80 employees who work at the Arlington facility. [Exceptions 1, 56].

6. Whether the ALJ erred in concluding that knowledge of the protected activity by lower level supervisors existed based upon the fact that two of the three alleged discriminatees (Rainey and Irving) wore more distinguishable pro-union shirts and/or more pro-union buttons than other employees – despite the fact that numerous employees wore pro union shirts and buttons and were not terminated. [Exceptions 66-68].

7. Whether the ALJ erred in concluding that Lloyd was a known union supporter when by his own testimony he only recalled wearing one pro-union button to work one day. [Exceptions 38-47, 69].

8. Whether the ALJ erred in concluding that on the one day Lloyd admitted wearing a pro-union button to work, the Company's HR manager asked him two times if he was alright, when Lloyd testified in his sworn affidavit to the Board that it only happened once. [Exceptions 6, 7, 43-47].

9. Whether the ALJ erred in concluding that the initial decision to terminate the three team leaders at issue was not made until after the election petition was filed, when the record evidence and uncontested testimony from the ultimate decision maker was that he decided before the petition was filed. [Exceptions 37, 79-83, 94].

10. Whether the ALJ erred in applying the Wright Line standard by failing to require the General Counsel to prove that antiunion animus was a substantial or motivating factor in the adverse employment action. [Exceptions 109-110, 113].

11. Whether the ALJ erred in concluding that a lower level supervisor wholly unconnected with the termination decision threatened Rainey and Lloyd when he spoke to Irving, even though Irving admitted he never told Rainey and Lloyd about the comments. [Exceptions 61-65, 69-74, 104].

12. Whether the ALJ erred in finding anti-union animus based upon the contradictory testimony of Rainey and Irving about whether, after the election, a lower level supervisor gave them "the finger" (as Rainey said) or pointed his index finger (as Irving said at hearing), or just raised his arms (as Irving said in his sworn affidavit to the Board). [Exceptions 75-77].

13. Whether the ALJ erred in concluding that even though she discredited Rainey's testimony about being given "the finger," the lower level supervisor's "gestures or body

language" (which the ALJ did not describe or clarify given the contradictory testimony from Rainey and Irving) was evidence of anti-union animus. [Exceptions 75-77].

14. Whether the ALJ erred in failing or refusing to cite to or even consider the uncontested evidence presented by the Company that it constantly follows "lean manufacturing" principles, resulting in the terminations at least five other team leaders or other managers in reductions in force before the election petition was filed as part of its ongoing efforts to align staffing at the plant with other plants in the plastics division. [Exception 156].

15. Whether the ALJ erred in too broadly applying a stipulation entered into by the Company in good faith (at the urging of the ALJ to avoid a subpoena response issue) to apply to anything other than financial *records*. [Exceptions 96-102].

16. Whether the ALJ erred in finding that the above-referenced stipulation meant the Company "denies that financial considerations, costs or even productivity had anything to do with eliminating" the positions. The stipulation provides only that the Company did not generate or rely on specific financial *records* in the decision making process. [Exceptions 96-102].

17. Whether the ALJ erred in substituting her own opinion over the Company's conclusions about their business operations and staffing levels. [Exceptions 84-93].

18. Whether the ALJ erred in concluding without proof that the Company's termination decisions were done by seniority, "In order to give the appearance of conformity." [Exceptions 84-93].

19. Whether the ALJ erred in failing or refusing to cite to or even consider the uncontested evidence presented by the Company that its employee handbook for the facility

provides that reductions will be made by seniority and the uncontested evidence of the Company's adherence to the handbook provision and its past practice in this regard. [Exceptions 93, 157].

20. Whether the ALJ erred in substituting her own opinion over the Company's when she concluded that the three alleged discriminatees should have been given the opportunity to take a demotion and remain employed at the facility, despite the acknowledged employee handbook provision to the contrary and despite the uncontested testimony from the plant manager that they had never permitted this to happen in the past. [Exceptions 103, 158].

21. Whether the ALJ erred in concluding that the Company's asserted reasons for the terminations were pretextual. [Exceptions 111-112].

22. Whether the ALJ erred in concluding that the Company would not have eliminated these jobs in the absence of the employees' union activity. [Exception 114].

23. Whether the ALJ erred in finding the "most telling evidence of animus" to be Luckie's alleged statement to Irving that he was "highly disappointed" in him for supporting the union when Irving's scant testimony on this point was devoid of any context, date or time frame when the alleged comment was made. [Exception 107].

24. Whether the ALJ erred in concluding that the alleged discriminatees were not supervisors. [Exceptions 108, 120-146].

25. Whether the ALJ erred in concluding – without proof – that the fact the three team leaders voted in the election without objection (by either the union or Company) meant the Company considered them *not* to be supervisors. [Exceptions 95, 116-119].

26. Whether the ALJ erred in concluding that the team leaders could not effectively recommend hiring, firing and disciplining employees. [Exceptions 120-146].

27. Whether the AJL erred in concluding that "Respondent provided no documentary evidence" or testimony about team leaders assigning work, when their written job descriptions provide as such and the team leaders and the plant manager all testified to this fact. [Exceptions 120-146].

28. Whether the ALJ erred in concluding it was inconsequential that the team leaders admitted they "ran" the plant when the supervisor was absent. [Exceptions 120-146].

29. Whether the ALJ erred in finding the team leaders did not use discretion and independent judgment in performing their jobs. [Exceptions 120-146].

30. Whether the ALJ erred in failing or refusing to consider additional evidence presented by the Company regarding the supervisory status of the three team leaders. [Exceptions 120-147].

31. Whether the ALJ erred in concluding that the Company interrogated employees by asking them whether they wanted an antiunion sticker. [Exceptions 8-12, 17-22, 48, 104, 148-149].

32. Whether the ALJ erred in making the conclusions about the antiunion stickers when there was no evidence that any supervisor remained to see if the employees wore or did not wear any of the stickers. [Exceptions 8-12, 17-22, 48, 104, 148-149].

33. Whether the ALJ erred in crediting the testimony of Jamy Nickerson to conclude that a supervisor distributed stickers when Nickerson testified only about someone named "Henry" whom he said was *not* a supervisor, but the ALJ nevertheless presumed the "Henry" he was talking about was Henry Bates, a supervisor. [Exceptions 13, 14, 15 and 16].

34. Whether the ALJ erred in finding that Nickerson's above-reference testimony was not undercut by Nickerson's sworn statement he submitted to the Board that "No supervisors asked me to wear a no means no sticker." [Exceptions 13, 14, 15 and 16].

35. Whether the ALJ erred in concluding the Company "also distributed company shirts" when the only testimony on that fact was from Rainey who conceded the person he alleged to be passing out shirts was not a supervisor. [Exceptions 8-12, 17-22, 48].

36. Whether the ALJ erred in concluding that the Company interrogated employee Raul Castaneda concerning his union sympathies. [Exceptions 23-36, 104-105].

37. Whether the ALJ erred in concluding that the Company promised Castaneda increased benefits and improved terms and conditions of employment if the employees refused to support the Union. [Exceptions 23-36, 104-105, 150].

38. Whether the ALJ erred in concluding that there were two relevant conversations between Castaneda and the plant manager, when Castaneda testified one of the conversations was *after* the election. [Exceptions 23-36, 105, 150].

39. Whether the ALJ erred in concluding that the Company threatened that employees would be terminated because of their union activities and/or sympathies. [Exceptions 104, 106-107, 151].

40. Whether the ALJ erred in failing or refusing to consider the uncontested evidence undercutting Rainey's credibility, such as the fact that he had been disciplined four times and suspended for three days by the same lower level supervisor (Joe Lee) he claimed gave him "the finger." [Exceptions 2, 3 and 4, 109-110, 159].

41. Whether the ALJ erred in failing or refusing to consider the Company's protected employer free speech rights guaranteed by 29 USC § 158(c) in that the Company's agents were expressing views or opinions without threat of reprisal, force, promise or benefit [Exceptions 104, 160].

42. Whether the ALJ erred in concluding that the Company terminated Chris Rainey, Rockey Lloyd, and Alsee Irving III because these employees assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. [Exceptions 115, 152-155].

III. Argument

A. Termination of the Three Team Leaders

The primary issue in the case revolved around the termination of three team leaders. On this point, the case law is well settled that General Counsel had the burden of proof to establish four distinct and separate elements by a preponderance of the evidence: (1) the existence of activity protected by the Act; (2) that the decision maker knew the employee(s) had engaged in such activity; (3) an adverse employment action; and (4) a link, or nexus, between the protected activity and the adverse employment action. *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981). *See also Mano Electric, Inc.*, 321 NLRB

278, 280 fn. 12 (1996); *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991); and *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401-03 (1983) (approving the *Wright Line* test).

In the ALJ's decision, she made key errors of fact or law on the burden of proof, knowledge and nexus issues.

B. Burden of Proof

1. The General Counsel Must Show the Decision Maker had Knowledge

To satisfy their burden of proof on the knowledge element, the General Counsel must show that ***the decision maker*** responsible for the termination at issue knew that the employees were involved in union activities. *Vulcan Basement Waterproofing v. NLRB,* 219 F.3d 677, 685 (7th Cir. 2000) ("the decision-makers at Vulcan had to know of" the protected activities); *Jim Walter Resources, Inc. v. NLRB,* 177 F.3d 961, 963 (11th Cir. 1999) (reasoning that "[n]one of the persons who gave 'bad attitude' statements was 'an agent responsible for hiring'"); *NLRB v. McEver Eng'g, Inc.,* 784 F.2d 634, 640 (5th Cir. 1986) ("[b]efore an employer can be said to have discriminated against its employees for their protected activity, the Board must show that the supervisor responsible for the alleged discriminatory action knew about the" union activity); *Air Surrey Corp. v. NLRB,* 601 F.2d 256, 257-58 (6th Cir. 1979) (vacating the Board's order because substantial evidence did not show that the employee's supervisor knew of his protected activity); *see also, Richdel, Inc.,* 265 NLRB 467, 475-75, 1982 WL 24028 (1982) (focusing on the decision maker's knowledge of protected activities).

2. Mr. Connolly was the Decision Maker

Here, the facts were uncontested and the ALJ acknowledged that Paul Connolly was the ultimate decision maker and the highest ranking member of management to testify. [ALJ 16]. Mr. Connolly is the General Manager for both of the Company's plants in Ada, Oklahoma and Arlington, Texas. [Tr. 376]. Mr. Connolly, though, primarily works in Ada and is only in

Arlington "once or twice a month." [Tr. 377]. It is undisputed that it was Mr. Connolly's decision to terminate the three individuals at issue. [Tr. 392, "Ultimately, it was your decision to make these reductions? Definitely;" Tr. 388, "And I made the decision"].

3. The General Counsel Failed to present any evidence of Knowledge

The General Counsel failed to present ***any*** evidence to show that Mr. Connolly had knowledge of the three former employees engaging in protected activity. The ALJ found in error that the General Counsel "had no duty" to prove Mr. Connolly had knowledge of the alleged protected activity. [ALJ 16]. Instead, the ALJ presumed knowledge existed based on the number of buttons the three team leaders wore or the type of pro-union shirt they wore despite the fact that they never proved Mr. Connolly ever saw them in their shirts or with their buttons. She also presumed knowledge based upon the number of employees at the plant.

a. The Union Shirts and Buttons

Mr. Connolly was asked only if he knew "***some people*** wore union shirts." [Tr. 389] (Emphasis added). They ***did not*** ask if he knew if the three alleged discriminatees wore union shirts (or buttons or other union paraphernalia). Likewise, General Counsel asked Mr. Connolly if he "heard that ***someone*** wore a shirt with Luckie's name on it." [Tr. 389] (Emphasis added). They ***did not*** ask him if he knew whether one of the three alleged discriminatees wore a shirt with Luckie's name on it.

One of the alleged discriminatees, Mr. Lloyd admitted, "I wore my pin at work ***one time***." [Tr. 232] (Emphasis added). That one time was a meeting where he identified who was present, but did ***not*** say Mr. Connolly was present. [Tr. 196]. He conceded that no one ever asked him about his pin. [Tr. 198]. Likewise, Mr. Irving could only recall with any degree of certainty speaking up at one meeting where the union organizing was discussed. [Tr. 130]. He identified all the supervisors who he claimed were there – "Mel Kemp, Rick Smith, the guy

Gary, Mike Luckie, Mason Fishback" and "Margaret Johnson," but did not claim that Paul Connolly was there. [Tr. 130]. The same is true from Mr. Rainey's testimony. He identified managers who attended meetings regarding the union organizing effort as "Mike [Luckie] and Rick Schmidt, Gary, I don't know his last name, you know, but the supervisors, Brian Holland, David Mitchell, Matthew Workman, you know, Margaret Johnson, just management." [Tr. 70]. He never identified Mr. Connolly as being present.

On the point of alleged employer knowledge, the ALJ specifically references Mr. Lloyd's testimony about a very brief conversation he had with Mr. Connolly at the plant during the campaign. [ALJ 15]. However, Mr. Lloyd also admitted, "I wore my pin at work ***one time***." [Tr. 232] (Emphasis added) and it was not the time where he had the conversation with Mr. Connolly. [ALJ 15; Tr. 196]. Mr. Lloyd also conceded that Mr. Connolly had similar conversations with him well before the campaign. [Tr. 223-24].

The ALJ's conclusion that knowledge could be inferred by the number of buttons worn by the three (or, at least two of the three) is illogical. Even Mr. Irving conceded that there were "a lot of people wearing pro-union buttons" but those people did not get fired. [Tr. 164]. General Counsel cannot prove knowledge of alleged protected activity related to the decision to terminate these three Team Leaders when by their own testimony a lot of other employees did the same exact thing as them and did not get fired.

b. The Number of Employees at the Plant

The ALJ also found, "With a total of only 80 employees, it is reasonable to conclude that Connolly was fully aware of those employees who openly demonstrated their support for the Union." [ALJ 16].

First, her unsupported comment of "only 80 employees" is not supported by the record evidence. The employee roster showed more than 80 hourly employees alone [GC 17], not to

mention the salaried and supervisory personnel. In addition, the ALJ acknowledged that Mr. Connolly also was directly responsible for another facility with 350 employees [ALJ 3], but does not explain how Mr. Connolly was somehow supposed to memorize the names of more than 450 people under his indirect supervision.

Second, the ALJ did not cite to any authority to sustain her proposition that knowledge can be presumed by the number of employees at the facility. This "small plant" doctrine has been rejected in similar circumstances.

For example, in *Synergy Gas Corp.*, 290 NLRB 1098 (1988), the Board upheld an ALJ's finding regarding the employer's lack of knowledge of union activity. Lacking direct evidence of any supervisory or managerial knowledge of union activity, the General Counsel relied upon circumstantial evidence to argue that an inference of knowledge should obtain from the small size of the plant, the openness and lack of concealment of the organizer-employee's activities and the fact that two members of management had sons who were employed as drivers. The ALJ rejected the argument, noting the "amount of room left for such guesswork demonstrates the size of the evidentiary void in this case." *Id.* at 1101-1102 (Emphasis added)

Likewise, in *Friendly Markets,* 224 NLRB 967 (1976), the Board upheld the ALJ's finding that knowledge of union activity could ***not*** be inferred solely from the small size of the company's plant, even though there were only ***ten*** employees in that case. The ALJ concluded that the "small plant doctrine was not applicable where it was premised solely on the small size of the plant or the small number of employees. In that regard, the Board concluded, consistent with *Hadley Manufacturing Corp.*, 108 NLRB 1641 (1954), that the small plant doctrine does not permit a finding that an employer had knowledge of union activities "absent supporting evidence that the union activities were carried on in such a manner, or at time that in the normal

course of events, respondent would have noticed them." *See also, Samsonite Corp.*, 206 NLRB 343 (1973) (small plant where supervision had close contact with employees).

General Counsel cannot and did not carry its burden of proving that Mr. Connolly had knowledge of the alleged protected activity by such sheer speculation. Further, the ALJ committed error when she presumed that Mr. Connolly had knowledge given the size of the workforce.

4. Adverse Inference

General Counsel subpoenaed Mr. Connolly to testify in its case in chief and then failed or refused to ask him whether he knew if the three team leaders supported the union. As evidenced by the testimony, the General Counsel had taken a sworn statement from Mr. Connolly during the investigation. [Tr. 377]. The General Counsel then subpoenaed Mr. Connolly to appear at the hearing in this matter and knew from Mr. Connolly's statement, the Company's position statement, and his testimony at the hearing, that Mr. Connolly was the decision maker regarding the terminations.

Despite this, General Counsel ***never asked*** Mr. Connolly if he knew whether the three employees at issue were union supporters. The Company urged the ALJ to draw an adverse inference from the fact that General Counsel failed to ask such a critical question of this critical witness. The Company pointed out that in Mr. Connolly's affidavit, which was shown to him and referred to in his testimony, Mr. Connolly denied having such knowledge. On this point, however, the ALJ concluded, "the Acting General Counsel had no duty to make such inquiry." Further, she added that the Company should have elicited testimony from him on this point.

The ALJ's conclusions essentially eviscerate the long line of cases that require the General Counsel ***to prove*** knowledge (rather than have it be presumed to exist by the ALJ). Further, she impermissibly shifted the burden to the Company to ***disprove*** knowledge. When the

General Counsel concluded their case without any proof on this key question, the Company reasonably did not want to reopen the record on this issue for the very reason that it is the General Counsel's burden of proof to show knowledge of protected activity and they had not done so during their case in chief.

C. Imputed Knowledge

The ALJ then went on to hold that knowledge of pro-union activity by lower-level supervisors could be ***imputed*** to Mr. Connolly. She cited one case from 1997, *GATX Logistics*, in support of this conclusion, but that case has been severely limited by the Courts of Appeal that have considered this issue. One example is the *Vulcan Basement Waterproofing* case decided by the 7th Circuit in 2000. In that case, the Court considered an almost identical circumstance: the GC urged the ALJ to impute knowledge from a subordinate to a superior and cited the same *GATX Logistics* case cited by our judge here.

First, the 7th Circuit pointed out that GATX Logistics ***did not*** stand for the proposition cited. The Court found, "A close reading of GATX reveals that the NLRB did not impute the supervisor's knowledge of the employee's union activities to the decision maker" because it found actual knowledge instead. Second, the Court specifically found, "regarding imputation, courts have generally rejected the NLRB's attempts to simply attribute a foreman or supervisor's knowledge of an employee's union activities to the company" because "automatically imputing such knowledge to a company improperly removes the General Counsel's burden of proving knowledge." *See, Vulcan Basement Waterproofing of Ill., Inc. v. NLRB*, 219 F.3d 677, 685-686 (7th Cir. 2000.

The 5th Circuit has likewise held that imputing knowledge is impermissible. *See, Delchamps, Inc. v. NLRB*, 585 F.2d 91, 94-95 (5th Cir. 1978) (The Board relied on the theory that the law should mechanically impute the knowledge of others to the decision maker. We

reject that theory and, therefore, refuse enforcement of this part of the Board's order); *Pioneer Natural Gas Co. v. NLRB*, 662 F.2d 408, 412 (5th Cir.1981) (In establishing the knowledge element, the Board may not simply impute the knowledge of a lower-level supervisor to the decision-making supervisor); *NLRB v. McCullough Envtl. Servs.*, 5 F.3d 923, 932-933 (5th Cir. 1993) (ALJ's mechanical imputation of knowledge to the decision maker rejected).

D. Lack of Nexus

The ALJ concluded that there was a nexus between the termination of the team leads and the knowledge she imputed to Mr. Connolly (or presumed he had) about their alleged pro-union activities [ALJ 16-19]. She rested her opinion on four grounds: (1) the alleged 'threat' by admittedly low-level supervisor Joe Lee to Mr. Rainey and Mr. Irving; (2) management's general 'view' of Mr. Rainey and Mr. Irving's association with the union; (3) timing; and (4) the Company's proffered reason for the terminations.

"The NLRB's conclusions must have a reasonable basis in the law, and its factual findings must be supported by substantial evidence, which 'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Vulcan Basement Waterproofing of Ill., Inc. v. NLRB*, 219 F.3d 677, 684-685 (7th Cir. 2000). The ALJ's conclusions failed both parts of this test.

1. The Alleged Threat

The ALJ found that IT Manager Joe Lee made a 'threat' to Rainey and Irving. [ALJ 17]. However, there was no evidence that Lee's alleged comments had anything to do with the union, that they were ever actually communicated to Rainey or Irving, or that Lee had any input whatsoever in the decision to terminate the three employees.

Even though the alleged "threats" were related to Mr. Rainey and Mr. Irving, there was no evidence that they actually ever heard them. The only witness who testified on this allegation was Mr. Lloyd. In his testimony, Mr. Lloyd claimed that Mr. Lee made comments to him related to Mr. Rainey and Mr. Irving. He claimed Mr. Lee said, "they going to end up getting rid of Al [Mr. Irving]" and "They don't have a long life at Flex-N-Gate if they keep up all the things they're doing, because they're nothing but problems." [Tr. 194].

However, General Counsel never connected the comments to the union organizing or any protected activity. The evidence showed that Mr. Lee had already written up Mr. Rainey for misconduct long before the petition was filed and that Mr. Rainey was suspended for three days as a result. Mr. Rainey conceded he did not get along with Mr. Lee [Tr. 94], that his relationship with Mr. Lee "wasn't a good one" [Tr. 94], and that he deserved the punishment, saying, "I was wrong." [Tr. 95]. A three day suspension for admitted misconduct is certainly evidence of "problems" with Mr. Rainey that have nothing to do with the union. It is just as plausible that Mr. Lee's alleged comment about not having a "long life" at Flex-N-Gate could be attributed to ongoing poor performance and disciplinary problems, not pro-union support. Mr. Lloyd even admitted that Mr. Lee had made similar comments to him in the past – before the union campaign started – about Mr. Rainey and the problems he had with him. [Tr. 232-33].

Further, the comments were so inconsequential that Mr. Lloyd never told Irving or Rainey about them. [Tr. 228]. Mr. Lloyd explained that Mr. Lee's comment "was in this ear and out the other one" and that he never passed along the comment or complained about it to anyone. [Tr. 228; 432-33].

For his part, Mr. Lee categorically denied making any threats to any employee. [Tr. 446] and it was uncontested that Lee took no part in the decision to terminate the three employees.

[Tr. 433; 448]. The ALJ does not adequately explain why his testimony should be completely discounted and does not connect Lee's alleged threat communicated to Lloyd allegedly about Rainey and Irving to the termination decision.

As such, any alleged threat was unconnected to the ultimate decision to terminate the Team Leaders at issue and therefore harmless "stray remarks" unconnected in time and substance to the terminations. *Paintsville Hospital Co., Inc.*, 278 NLRB 724, 725 (1986) (no "threat" found where managers cautioned employees against certain conduct because the managers "were acting in their own interest and in accordance with their own sympathies which were plainly contrary to those of management").

2. Management's Alleged "View" of the Employers

The ALJ considered two primary issues regarding what she asserted was how management viewed Rainey and Irving's association with the union. [ALJ 17-18].

First, the General Counsel alleged that immediately after the election, Mr. Lee walked by Mr. Irving and Mr. Rainey and made some sort of gesture that was somehow evidence of anti union animus. [ALJ 17]. The "gesture" allegation lacks any credibility. Even the alleged discriminatees could not get their stories straight as their testimony conflicted with one another and contradicted their prior, sworn statements to the Board.

As found by the ALJ, Mr. Rainey claimed Mr. Lee gave them the "middle finger" then walked out. [ALJ 17, Tr. 75]. Mr. Irving said Mr. Lee just pointed his index finger. [ALJ 17, Tr. 159]. However, Irving's testimony contradicted his own prior sworn statement to the Board where he said (under oath), "He walked by, smiled at us, and threw his hands up in the air." [ALJ 17, Tr. 165].

The ALJ found that both Rainey and Lee "reported the incident" to the plant manager. However, she failed or refused to consider the fact that Rainey contradicted himself on this point via his prior sworn statement to the Board. On cross-examination, Mr. Rainey confirmed that in his sworn statement to the Board given just days after his termination, he "***never said anything*** about complaining to Flex-N-Gate about Joe Lee allegedly flipping you the bird." [Tr. 98] (Emphasis added). Mr. Luckie confirmed that Mr. Rainey never complained about Mr. Lee regarding anything related to the union. [Tr. 432-33]. No one complained about Mr. Lee regarding anything related to the union. [Tr. 432-33].

Mr. Lee denied making any gestures to any of the three Team Leaders. Mr. Lee testified that he did not have any interaction with Rainey, Lloyd or Irving after the vote and "didn't even see any of the three after the vote." [Tr. 447-48].

Ultimately, the ALJ had to discredit Mr. Rainey in part (regarding the "middle finger"), but accept his discredited testimony in other parts (the complaint to management and the fact that Lee made some sort of gesture). [ALJ 18]. This piecemeal acceptance and rejection of testimony from the same witness on the same issue is clearly in error. *See*, *Wal-Mart Stores*, 341 N.L.R.B. 796 (N.L.R.B. 2004) (in case decided by this same ALJ, Board found that the "Respondent has effectively excepted to some of the judge's credibility findings"); *Standard Dry Wall Products*, 91 NLRB 544 (1950) (The Board may override an ALJ's credibility resolutions where the clear preponderance of all the evidence shows the judge's opinion is incorrect).

Finally, even if Mr. Lee made some sort of undefined gesture (the ALJ never settled on what the gesture actually was), there is absolutely no evidence or support for finding that the gesture equated to how "management" as a whole thought of the union as concluded by the ALJ.

Second, the ALJ found the "most telling evidence of animus" to be Luckie's alleged statement to Irving that he was "highly disappointed" in him for supporting the union. [ALJ 17]. This is clearly in error. Irving's scant testimony on this point was devoid of any context, date or time frame when the alleged comment was made. [Tr. 126]. Luckie did confirm that he viewed team leaders as supervisors and therefore members of management. [Tr. 422-23]. However, his testimony likewise did not indicate a date or other context. Without that information, the ALJ's conclusion about the comment being evidence of animus is clearly in error.

3. Timing

a. Mistake of Fact

The ALJ made a critical mistake of fact in this section of her opinion where she concluded Mr. Connolly did not make the decision until the "third week in August" which was after the union had filed its election petition. [ALJ 18]. The credible evidence showed that Connolly made the conclusion ***before*** the petition was filed.

Mr. Luckie was on vacation the last part of ***July*** or first part of August in 2010. [Tr. 334; 380]. Mr. Connolly filled in for him to manage the plant while he was gone. [Tr. 334]. The union's election petition was not filed until August 11, 2010. [GC Ex. 31, Tr. 397]. While Mr. Connolly was filling in for Mr. Luckie, he determined, "When we looked at Team Leaders at other facilities, it was clear that the Team Leaders were heavy at Arlington." [Tr. 392] and that the Arlington plant was overstaffed and "it definitely needs some improvement, and ultimately, I am in charge of that facility, and I told Mike [Luckie] that you better make some changes, and I can help you with that." [Tr. 382].

The timing actually favors the Company here as the decision was made before the election petition was filed. The General Counsel tried to insist on putting words in Mr. Connolly's mouth about "late August," but he clarified it was actually July:

Q. And it was late August when you first communicated the idea to reduce team leaders –

A. Oh, no. It was –

Q. Late August?

A. It was actually when Mike [Luckie, the plant manager] was on vacation. Mike went on vacation sometime ***in July***.

[Tr. 380] (Emphasis added).

Mr. Connolly then waited to execute on the decision because he was advised he should not make changes during the pendency of the election campaign. [Tr. 383, "I'm not a lawyer, but I know regulations-wise, you can't do anything within that time period"].

The uncontested evidence was that there was a prior union organizing effort, with an election petition filed in 2007. [Tr. 413-15]. The union withdrew the petition the day before the election. [Tr. 413-415]. As demonstrated in the chart below, the Company eliminated team leader and manager positions after that matter without any resulting charges because they were wholly unconnected to the union's organizing effort. [Tr. 413-15]. The same is true in 2010, when the Company first determined that the team leader positions were redundant before the election, but waited during the pendency of the election process and then followed through on its decision a month and a half after the election. The Company continued to eliminate management positions after the three team leaders at issue here and did not hire any new employees during that long period of time.

The Company's position is supported by relevant case authority. See, *Ferguson Enterprises*, 2002 NLRB LEXIS 504, 41-43 (N.L.R.B. Oct. 16, 2002) (the ALJ found that the timing of the reduction in force was logical based upon the fact that the Respondent decision maker did not know of the union activity and discussions of reduction in staff had occurred prior

to the protected activity, concluding that the timing of the reduction in force and the union activity was coincidental); *Ogihara Am. Corp.*, 347 N.L.R.B. 110, 113-114 (N.L.R.B. 2006) (finding that ALJ's conclusion of suspicious timing due to one month interval between protected activity and discharge was too much speculation).

b. Mistake of Law

The ALJ also erred in making the legal conclusion that "the timing of the decision to eliminate these team leader positions is suspect and supports a finding of unlawful motive." [ALJ 18].

For example, the ALJ cites *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002) for the premise that timing can be evidence of unlawful motivation. However, in that case, two employees (drivers) were terminated ***three days*** after the employer learned of union activity. On March 10, 2000, the employer learned of union activity. On March 12, the Company monitored their driving runs and submitted a report stating that the drivers had committed safety violations. On March 13, the employees (one of which started the organizing campaign, the other signed the petition) were terminated without being given the opportunity to explain or present their version of the facts. Relying upon the suspicious timing and disparate treatment (the Company had never terminated an employee for these safety violations previously; there was also evidence that the Company was lenient with drivers); the Board upheld the ALJ's determination that the terminations violated 8(a)(3).

By contrast, Flex-N-Gate made the initial determination that there were too many team leaders ***before*** the election petition was even filed. Moreover, Flex-N-Gate followed its employee handbook and past practice in using seniority to decide who to terminate. Finally, these terminations were part of on ongoing process to align staffing at the Arlington facility with other plants and follow basic "lean manufacturing" principles. The Company had eliminated

five other team leader and other manager positions in the past and continued to do so after these three team leaders were terminated.

The ALJ also cited to *NLRB v. Windsor Industries,* 730 F.2d 860 (2d Cir 1984) which is also clearly distinguishable on the facts. There, the Court held in pertinent part that the abruptness of a discharge and its timing are persuasive evidence as to motivation where employees were laid off ***eight days*** after the beginning of the Union campaign and just ***five days*** after the Company received the recognition demand. In addition, the employer there had never before laid off any employees. *Id.* at 864.

Finally, it is worth noting that this same ALJ has been overturned in the past by the Board when she relied on suspicious timing as evidence of unlawful motive. In *K-Mart Corp.*, 341 N.L.R.B. 702 (N.L.R.B. 2004), the Board refused to adopt the ALJ's suspicious timing findings. In that case, the Board found the ALJ "found antiunion motivation for [the employee's] discharge was established largely on the timing of his termination that occurred during the same time period as his dispute with [the HR manager] over taking time off to prepare for [union] negotiations." *Id.* At 10-11. The Board rejected the ALJ's conclusion, noting that the discharge was consistent with the handbook rule in place at the company. The Board also relied upon the evidence showing the company's consistent treatment of employees with similar issues.

The same facts are present here as Flex-N-Gate demonstrated conclusively and without rebuttal from the General Counsel that it followed its employee handbook regarding reductions occurring by seniority and followed its past practice regarding similar reductions of other team leaders and managers.

4. Other Reductions at the Plant

The ALJ committed reversible error via her failure or refusal to consider the Company's uncontested evidence that it had been undertaking a continuous streamlining, efficiency or "lean manufacturing" process which started long ***before*** the union ever filed their petition for election.

The Company had a prior reduction in force affecting management employees Margaret Lawler and Heather Casados. They were specifically terminated due to a reduction in force. [Tr. 416-17, GC Exs. 25 and 26]. In addition, the Company eliminated other management positions through attrition or consolidation of operations. [Tr. 416-17, GC Exs. 27 and 28] [Tr. 235, explaining how there used to be separate Team Leaders over Cadillac welds and common welds, but that Nico Brown was terminated and her position was never filled]. One of those former employees, Sabbath de la Garza, was the first shift IT Team Leader, the exact same job Mr. Rainey had on second shift. [Tr. 416-17; 431].

Even after the three alleged discriminatees were terminated, the Company continued its ongoing process of looking for further efficiencies. In 2011, for example, the Company has eliminated two temporary positions by a change in workflow, and eliminated another supervisor position through attrition. [Tr. 418-19]. The last full time, permanent employee hired by the Company in Arlington was Cody Paul in May of 2010, more than a year before the hearing in this matter and a full six months before the reduction of force at issue here. [Tr. 432, GC Ex. 17, p. 2 Cody Paul's seniority date is 05/24/10]. Further, the Company clearly and consistently communicated the reason for the termination to the three individuals as a reduction in force. [GC Exs. 2, 12, and 14].

Those terminations and cessation of any new hires are summarized as follows:

Date	Employee Name	Position	Reason	Citation
03-31-2008	Sabbath de la Garza	IT Team Lead (1st Shift)	Position eliminated	GC 28; Tr. 353; Tr. 417
06-2008	Wendy Spinks	Materials Superintendent	Position eliminated	Tr. 353, GC 30
12-30-2008	Margaret Lawler	Quality Supervisor	Reduction in force	GC 25
02-10-2009	Heather Casados	HR Support	Reduction in force	GC 26
05-24-2010	Cody Paul	**LAST NEW HIRE PRIOR TO THE HEARING**		Tr. 432; GC 17
07-15-2010	Nico Brown	Team Lead	Position eliminated	Tr. 353, GC 27, GC 30
11-05-2010	Chris Rainey	IT Team Lead (2nd Shift)	Reduction in force	ALJ 3
11-05-2010	Al Irving	Team Lead	Reduction in force	ALJ 4
11-05-2010	Rocky Lloyd	Team Lead	Reduction in force	ALJ 4
06-2011	Matt Workman	Supervisor	Position eliminated	Tr. 418
06-2011	Two Temps	Harness Rack	Positions eliminated	Tr. 417

The ALJ did not consider any of this evidence in reaching her decision. This was clearly in error.

E. The Staffing Comparisons

The Judge completely discounted the Company's uncontested evidence about the staffing levels at the Arlington facility compared with sister facilities and therefore substituted her own opinion for the business judgment of the Company. [ALJ 18-20].

Mr. Connolly testified "it's always a continuous process at both our plants. We need to look for reductions and be continuously improving" [Tr. 382] and the Company constantly reviews staffing levels. [Tr. 362, 371]. Mr. Connolly in particular was tasked with reviewing staffing (manpower) levels across the plastics division of the Company, including Arlington and

considering best practices when it came to staffing. [Tr. 380, 391]. He prepared staffing comparisons across those plants. [JT. Exs. 1(a), 1(b) and 2]. As shown in JT. Ex. 2, the Arlington facility is the only plant within the plastics division that has Team Leaders. The number of supervisors (including Team Leaders) to other hourly employees at Arlington was out of proportion to other facilities, including the Ada plant that Mr. Connolly directly supervised. He explained as follows:

> Oh, just actually when I looked at that and going across, I mean, those Team Leaders are much like supervisors. I said, comparably at Arlington, when I looked at that, the Team Leaders are much like a supervisor. I compared even the supervisor status at Ada, which is 350 people with 13 supervisors, and we had 80 people at Arlington with ten Team Leaders.
>
> [Tr. 387].

Mr. Rainey's situation was a little different. He was the only IT Team Leader left at the plant. As shown in JT. Ex. 2, there was 1 IT person for every 42 employees in Arlington. The closest comparator had ***twice*** as many employees for each IT person (Danville with a ratio of 1:89) while most of the other facilities had at least five times as many employees per IT person. The Ada plant where Mr. Connolly primarily worked had a ratio of 1 IT person for every 341 employees, meaning more than eight times as many employees were covered by one IT person in Ada. [JT. Ex. 2]. In sum, the Company's evidence showed that the number of IT support to total employees at Arlington "was definitely way out of whack" and that it had already eliminated Rainey's team lead counterpart on first shift.

Mr. Luckie explained that with more experience working on the GM project, the Company could improve efficiencies and processes and potentially reduce staff over time. [Tr. 371-72]. For example, with the terminations at issue here, Mr. Luckie explained that he used to

have a Team Leader for the front line and another for the rear line but, "Once I did my reduction, I streamlined my Team Leaders, and my Team Leader runs both lines." [Tr. 444].

The Company further established that Mr. Rainey had been out on medical leave for an extended period of time in 2010, totaling approximately five and a half months. [Tr. 101-02]. During the time Mr. Rainey was out on medical leave, the Company did not replace him [Tr. 102; 434] which served as a trial run of sorts for eliminating his position. The Company had already eliminated the first shift IT Team Leader, the exact same job Mr. Rainey had on second shift. [Tr. 416-17; 431].

Despite this overwhelming evidence, the ALJ impermissibly substituted her own opinion about the significance of the personnel numbers for that of the Company's representative charged with reviewing them. This constitutes reversible error as recognized by the Courts:

> We have observed on many occasions that courts do not sit as 'superpersonnel departments' charged with deciding whether an employer's decisions were 'right' or 'wrong'; our sole mission, in the typical discrimination case, is to decide whether the employee was discharged (or subjected to other adverse action) on the basis of criteria that Congress has deemed impermissible.

NLRB v. Gatx Logistics, 160 F.3d 353, 357 (7th Cir. 1998), citing *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 678 (7th Cir. 1997); *Mills v. First Fed. Sav. & Loan Ass'n of Belvidere*, 83 F.3d 833, 846 (7th Cir. 1996); *C.E. Natco/C-E Invalco*, 272 N.L.R.B. 502, 506 (1984), supplemented, 282 N.L.R.B. 314 (1986).

The Board has held similarly in several cases. *See, Schwartz Manufacturing Company*, 289 N.L.R.B. 874, 894 (NLRB 1988) ("To conclude that Respondent should have followed some different course of action to deal with the decreased demand for its products would require the trier of fact to substitute his business judgment for that of Respondent. That I cannot do").

F. The Stipulation as to Financial Records

The ALJ erred in too broadly applying a stipulation entered into by the parties at the hearing in order to resolve (at the ALJ's urging) an issue regarding the Company's production of documents in response to the General Counsel's subpoena *duces tecum*. [ALJ 18]. During the course of this matter, the General Counsel issued an investigative subpoena, and then three additional subpoenas prior to the hearing, including one that was delivered to the Company at 3:16 p.m. on the day before the hearing commenced. [Tr. 44-45]. The General Counsel had demanded that the company produce detailed financial statements and balance sheets of Flex-N-Gate, a privately held company. [Tr. 31-32]. The Company objected and filed a petition to revoke on that same issue. [Tr. 31-32].

Ultimately, in order to assist in streamlining the hearing and avoid further dispute over the production of Company financial records, the Company entered into a stipulation on this issue. However, the stipulation was limited to the production of "financial ***records***," and documents. [ALJ 19] (Emphasis added). The stipulation was entered into in order to avoid a document production issue, so it was naturally limited only to ***documents***, not testimony. For example, the stipulation provides further, "The only ***documents*** that the company asserts it relied upon..." [ALJ 19] (Emphasis added).

The stipulation did ***not*** undercut in any way the Company's stated position that as part of its lean manufacturing process, it is "always going to be looking at staffing levels" to make sure their operations are as lean as possible. [Tr. 372]. The plant manager confirmed that lean manufacturing means simply, "You want to make sure that your manpower you're running, that you're running only the manpower that you need to support your customer." [Tr. 416]. Mr. Connolly, the decision maker, testified, "When I look at lean manufacturing, maybe by reducing

people I can take out a block in the line and make the efficiency better, maybe get more parts out. There's all types of different efficiencies that you can make." [Tr. 390-91]. The point is that Mr. Connolly did not look at – and did not need to look at – bottom line financial ***records*** or balance sheets of the Company overall when looking at the staffing levels and considering ongoing lean manufacturing principles at the Arlington plant.

The ALJ erred in mis-applying the stipulation which was as to records only when she concluded, "By virtue of its stipulation, Respondent denies that financial considerations, costs or even productivity had anything to do with eliminating this position." [ALJ 21]. The stipulation says only that the Company did not rely on or generate "records" about those things. Mr. Connolly testified he is a long-time manager with a great deal of experience in this industry and with this Company. He manages several plants employing hundreds of employees and has a long history of implementing lean manufacturing processes without reliance on bottom line financial records to make decisions.

G. The Employee Handbook and Past Practice

The ALJ erred when she failed or refused to consider the Company's uncontested evidence that it followed its employee handbook and past practice when making the termination decisions at issue here.

After determining that staffing was too "heavy" at Arlington in the team lead job, Mr. Connolly testified they "looked [at] the handbook," the employee handbook, which specified that "the least senior people in that classification" should be let go. [Tr. 384, 430] [GC Ex. 11, p. 9, "Seniority, as defined above, will be the governing factor for . . . layoffs."]. Seniority is measured by date of hire per the handbook. [GC Ex. 11, p. 9] [Tr. 429-30]. Mr. Connolly was clear that they would follow the policy, when he said he "just determined there has to be some reductions in Team Leaders, so let's put our heads together and make sure that we have -- go by

the proper procedures." [Tr. 384]. Mr. Lloyd and Mr. Irving were the two least senior Team Leaders by date of hire. [Tr. 366-368, where Mr. Luckie identified the seniority of all Team Leaders, including the alleged discriminatees; 428-30] [GC Ex. 18]. Mr. Rainey was the only remaining IT team leader after the company had already eliminated the IT team leader position on first shift. The ALJ ignored this evidence and erred in doing so.

H. Team Leader Supervisory Status

1. Introduction and Summary of Supervisory Status

The Judge made several mistakes and omissions of fact and law on the issue of whether the team leaders qualify as supervisors under the Act. The Company presented voluminous documentary and testimonial evidence to support its position.

For example, the ALJ concluded without citation or support that "Respondent provided no documentary evidence or testimony from Luckie or any other supervisor to demonstrate specific circumstances when team leaders have assigned work to either permanent or temporary employees." [ALJ 24]. This is clearly a mistake of fact. The Company admitted as exhibits the team leaders' job descriptions which specify, in part, that they are "in charge of manpower for their area." [Respondent's Exs. O and Q].

The Company also presented lengthy testimony from Mr. Luckie and cross examination testimony from the three team leads where they admitted supervising others, recommending who to hire or fire, and engaging in day to day activities that required the use of discretion and independent judgment. Irving and Lloyd specifically admitted on cross examination that they could recommend discipline for employees on the teams they led. [Tr. 153; 229].

In sum, they had the authority to assign employees on their team to a place, time and task – and had to adjust their team to meet "hotshots" or daily, fluctuating production demands from GM. The Company held them accountable for doing a good job directing their team and even

disciplined Team Leads when their team made mistakes (we admitted the disciplinary document as an exhibit). They were paid more to manage, included in management meetings and given radios and e-mail addresses, things that hourly employees were not. They trained employees and made recommendations about who to hire, fire or discipline.

2. Legal Authority Regarding Supervisors

The National Labor Relations Act ("Act") specifically excludes supervisors from the protections of the Act. *See*, 29 U.S.C. § 152(3) excluding "any individual employed as a supervisor." The Supreme Court has noted that the objective of Congress was clear in choosing to exclude supervisors: "Employers were not to be obliged to recognize and bargain with unions including or composed of supervisors because supervisors were management obliged to be loyal to their employer's interests, and their identity with the interests of rank-and-file employees might impair that loyalty and threaten realization of the basic ends of federal labor legislation." *Beasley v. Food Fair of North Carolina, Inc.*, 416 U.S. 653, 659-60, 94 S.Ct. 2023, 2027 (1974).

"As the Supreme Court has recognized, this fact [that supervisors are specifically excluded from coverage under the Act] entitles an employer to insist on the loyalty of his supervisors and means that a supervisor is not free to engage in activity which, if engaged in by a rank-and-file employee, would be protected." *Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383, 386 (D.C. Cir. 1983), *citing*, *Florida Power & Light v. Electrical Workers*, 417 U.S. 790, 806-09, 94 S.Ct. 2737, 2745-47 (1974).

A "supervisor" is defined in Section 2(11) of the Act as:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or ***responsibly to direct them***, or to adjust

> grievances, or ***effectively to recommend such action***, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires ***the use of independent judgment***.

29 U.S.C. § 152(11) (Emphasis added).

On September 29, 2006, the Board issued a trilogy of decisions referred to as the *Kentucky River* cases, refining the analysis to be applied in determining whether an employee is a supervisor under the Act. In a key decision of the three, *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), the Board established new definitions for "assign," "responsibility to direct," and "independent judgment."

Essentially, an employee is considered a supervisor if they have authority to "assign" another employee to a place (e.g. department), time (e.g. work shift), or overall tasks, or if the individual has been delegated authority for directing other employees to perform specific tasks and the individual is accountable for how that authority is used and/or the outcome of the delegation. Regarding this second aspect, the Board provided that "the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." *Id.* at *8.

Finally, in exercising either of the options above, the employee must have discretion to make their own judgment regarding the assignment or direction. This element is interpreted to mean that "an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data," and the individual's decision must also be "not of a merely routine or clerical nature." *Id.* at *9.

It is important to note that in *Oakwood*, the Board found an employee can be a supervisor even if they do not spend all of their working time in a supervisory capacity. The individual must spend a regular and substantial portion of their time as a supervisor. The NLRB stated that "regular" means "according to a pattern or schedule, as opposed to sporadic substitution." *Id.* at *11. The decision noted there is no "strict numerical definition of substantiality," but that previous decisions have found supervisor status with as little as 10%-15% of total work time served in a supervisory role. *Id.*

3. Evidence and Facts Regarding Supervisory Status

The evidence at hearing showed conclusively that the three alleged discriminates were "supervisors" under the Act.

a. Team Leads Were Treated Like Management

The Company considers Team Leaders to be part of its management team and includes them in management meetings. [Tr. 419]. "Team leaders have an area that they're responsible for. They're responsible to make sure that the area is safe. They're responsible to make sure that the targets are hit by their teams. They're there to support their teams. Any type of training that needs to be done on the line, they're to support the training." [Tr. 418].

Team Leaders are paid more than any other hourly employees. [GC Ex. 11, Employee Handbook, p. 11][Tr. 176, Lloyd made $16.50/hour; Tr. 115, Irving made $16.95/hour; Tr. 83; Rainey made $17.95/hour].

b. They Managed Other Employees and Filled in for the Superintendent

Team Leaders do just what their title implies: they lead a team of hourly employees. Mr. Irving testified he "managed 13 to 15 people" and that it was his job to manage those people. [Tr. 145]. Mr. Lloyd managed 5 other people on his team. [Tr. 214]. Team Leads are involved in the

assignment and direction of people's work. [Tr. 419]. Mr. Irving agreed it was a Team Leader's job "to make sure that they [his team] were all doing their job." [Tr. 145-46].

Team Leaders also assign people what to do; help decide where manpower goes; make job assignments; and, prioritize the work of their team. [Tr. 420-21]. Team Leaders are responsible for training other employees. [Tr. 424]. The production Team Leader job description specifies that they are in charge of the manpower in their area, train team members, and assist the superintendent as needed. [Resp. Ex. O]. Team Leaders were even assigned radios, which were only distributed to members of management. [Tr. 441]. Only management and Team Leaders had company e-mail addresses as well. [Tr. 98-99].

Team Leads report directly to the Shift Superintendent, rather than other Team Leaders. [Tr. 418]. The Superintendent, in turn, reports directly to the Plant Manager. When the Superintendent is out of the building, Team Leads run the plant. [Tr. 418]. Mr. Irving confirmed this in his testimony:

> Q Okay. So the guy right above you, the supervisor, when he was there on second shift, he was your boss.
>
> A Yes, sir- He was my boss.
>
> Q Now, he would leave right? -- and go across to GM sometimes because he had to deal with the customer?
>
> A Yes, sir.
>
> Q And when he was gone, you ran the building.
>
> A I ran the building.

[Tr. 148].

c. Team Leads Effectively Recommend who to Hire or Fire

The Plant Manager Mr. Luckie seeks input from Team Leads in making decisions on who to hire and who to fire. [Tr. 418-19]. Mr. Luckie seeks input from Team Leads regarding the job performance of temporary employees as well. [Tr. 420]. They have even sat in on disciplinary meetings. [Tr. 419].

Mr. Irving confirmed that Team Leads could effectively recommend who to hire or fire when he testified, "Yes, sir. I can say, I think this guy's doing a good job, and, you know, I think you should hire him if you want him in the building." [Tr. 150]. Mr. Lloyd also confirmed this fact and agreed if a temp employee was doing a bad job, he "could recommend that the person [temp] not be hired" or, if they are doing a good job, recommend that the temp be hired. [Tr. 219]. Mr. Lloyd also confirmed that as a Team Leader, he could recommend discipline. [Tr. 229].

d. Team Leads had to use Discretion and Independent Judgment on Matters of Significance to the Company

The Company's sole customer at the facility in Arlington was a General Motors (GM) SUV assembly plant across the highway. [Tr. 88]. The Company pre-assembled fascias in the exact order that the vehicle was being built at GM across the street. [Tr. 88]. It was critical that the parts left Flex-N-Gate in the exact order that they needed at GM across the street. [Tr. 88].

The facility is a "just-in-time plant" with only two hours of product between it and its customer GM. [Tr. 441]. It is critical to keep the lines running and "Team Leaders know the importance of getting the lines back up and running [and] it's their job to get the line back up and running." [Tr. 441].

On occasion, there is a special order or "hotshot" from GM. [Tr. 420]. The Company has "a window that's been established between Flex-N-Gate and General Motors that once we get the call [for a hotshot], we have 30 minutes to get it there." [Tr. 420]. The Team Leaders

responsible for making sure hotshots get done. [Tr. 421]. Mr. Lloyd confirmed it was his "responsibility to make sure that hotshot got done in a hurry." [Tr. 215].

Team Leaders are given a target production number to hit and are then responsible for doing what it takes to hit that number. [Tr. 421]. Because the Company's production schedule is so dependent on GM's production schedule, the Company's work day and production needs could fluctuate quite a bit. [Tr. 217-18]. The Team Leaders were responsible for adapting to the fluctuating production needs and to make sure their team got the work done. [Tr. 218]. Team leaders are responsible for their lines when the lines go down. [Tr. 330-331].

Rainey was paid $17.95 an hour, which was more than any other Team Leader at the plant. [Tr. 83]. He advocated for that elevated pay because he felt his job was "critical" at the plant. [Tr. 83]. Rainey agreed that he "had a great deal of responsibility" in his job. [Tr. 83-84]. Luckie agreed that Rainey's job was "important." [Tr. 423].

The Company's Insequence software allowed it to communicate with its customer GM, to account for what parts would be built in what order. [Tr. 85]. If that software system broke down, Rainey was solely responsible for making sure he rectified the situation. [Tr. 423]. Rainey had the authority to do what he had to do to get it operational again and even Rainey confirmed that if he was not there to fix computer issues, the plant would shut down and could not produce parts. [Tr. 83, 423]. He was the only IT employee on the second shift and had to use his judgment to prioritize what he did each night in order to be able to accomplish his job. [Tr. 86-87].

e. Team Leads are held Accountable for the Performance of their Team

Team Leaders are held accountable for directing the work and production of their team. [Tr. 421-22]. Mr. Luckie confirmed the Company holds Team Leaders accountable for making

sure their team performs well. [Tr. 422]. The Company has disciplined Team Leaders for things that his team have done wrong. [Tr. 419]. Mr. Luckie testified about a specific issue "where wrong parts was shipped to the plant [GM], and the Team Leader got wrote up." [Tr. 419]. In fact, Mr. Irving was disciplined on March 24, 2009 because his "team shipped [two] fascias to GM in the wrong racks." [Tr. 158][Resp. Ex. K].

4. The Three Employees at issue were Clearly Supervisors

Based upon the Board's *Oakwood* decision, it is clear that the three employees at issue are supervisors under the Act. They had the authority to assign employees on their team to a place, time and task – and had to adjust their team to meet "hotshots" or daily, fluctuating production demands from GM. The Company held them accountable for doing a good job directing their team and even disciplined Team Leads when their team made mistakes. They were paid more to manage, included in management meetings and given radios and e-mail addresses, things that hourly employees were not. They trained employees and made recommendations about who to hire, fire or discipline.

The ALJ concluded without citation to authority that because the team leaders "voted without challenge in the September 2010 election" that the "most plausible reason is that Respondent has not previously considered these employees to be supervisors." [ALJ 23]. This conclusion is clearly in error.

First, the Company provided uncontested evidence that the outcome of the election was lopsided in favor of the Company and no post-election challenges were filed. Mr. Luckie confirmed that the margin of victory was greater than the number of total Team Leaders in the plant. [Tr. 371]. Thus, there was no need for the Company to contest the issue and it is not persuasive evidence of their supervisory status.

Second, the team leaders' votes were not challenged ***by the union*** either. There was ample testimony that Mr. Luckie and Mr. Connolly considered team leaders to be supervisors and therefore loyal to the Company. [Tr. 422, 435]. As such, an equally "plausible" (and unbiased) conclusion is that the Company would ***want*** the team leaders to vote and hope no challenge was raised by the union, concluding that they were more aligned with the Company than the union.

I. The "No Means No" Stickers

The Judge concluded that the Company interrogated employees by asking if they wanted green, "No Means No" stickers. She made errors of fact and law on the points in this section of her analysis.

1. Mistakes of Fact

Mr. Luckie testified that the green, "No Means No" stickers was an employee-driven (not management driven) process and that he specifically instructed managers that they could only pass them out if employees asked for them:

> We had -- from the floor, we had some operators that was against the union and wanted to know if we could get some buttons, and we said, no. Then they wanted to know if we could get some labels. And so we did print up some labels that said, No means no, just some round green labels. So the employees was asking us if we could do this, so we had some printed up. I had them shipped to me from Ada, put them in my office, had a meeting at nine o'clock, talked to my staff, said that the only way you can hand these out, if somebody asks you for them. And I'll be honest. People was coming in my office, wanting to know if they could get a label form me, and I gave them one. But as far as saying that they can go out and start asking people, do you want one of these, they were not trained that way.
>
> [Tr. 433-34].

Mr. Luckie testified he was not aware of any instance where a manager asked an employee if they wanted a sticker. [Tr. 434]. Further, no production employee ever complained about a member of management asking them to take a sticker. [Tr. 434].

Despite this evidence, the ALJ credited the testimony of employee Jamie Nickerson on this point. [ALJ 7]. However, Nickerson could not even recall the full name of the person he alleged offered him a sticker, and said in his mind the person was not a supervisor. He testified that the "Henry" he recalled was definitely ***not*** a supervisor, concluding, "I ain't never answered to him for nothing." [Tr. 297].

On cross examination, Mr. Nickerson confirmed that in his sworn statement to the NLRB he said, ***no supervisor ever asked him to wear such a sticker***:

> Q I just want to confirm a couple of things that you said in this affidavit when you promised to tell the truth. In the affidavit, you said, "No supervisors asked me to wear a, No means no, sticker." Do you recall that?
>
> A Yes.
>
> Q And that's true.
>
> A That's true.
>
> Q Now, also in the affidavit, you said, "No supervisors or managers talked to me about the union." Do you recall that?
>
> A That's true, other than the meetings like –
>
> Q Okay. And then you also said, "They were not threatening and did not ask me specifically about the union." Is that true?
>
> A Yes. That's true.

[Tr. 296].

Despite this, the ALJ went on to presume that Henry was in fact Henry Bates, a supervisor, even though Nickerson could not recall his last name and was adamant the Henry he was talking about was not a supervisor. [ALJ 6]. This "evidence" is insufficient to establish supervisory status. *See Sears, Roebuck & Co.*, 304 NLRB 193 (1991) (Board rejecting Hearing Officer's finding of supervisory status because "conclusionary statements made by witnesses in their testimony, without supporting evidence, does not establish supervisory authority.")

Juan Garcia's testimony on this issue was completely lacking in any credibility and the ALJ erred in refusing to sustain the Company's objection that General Counsel was leading the witness and providing the names that the witness could not recall:

> MR. KOENIG: Your Honor, if I might, she asked, Did any company representative ask you about your feelings about the union. He didn't know. He said, No. Then she fed him a name and said, What about Mason Fishback. She asked him, Were you familiar with these stickers. He said, No, so she told him what stickers that he should be remembering. It's leading the witness. He either remembers it or he doesn't.
>
> [Tr. 301].

The only other witness by General Counsel on the sticker issue was Mr. Lloyd. Mr. Lloyd testified only that Mr. Workman and Mr. Lee asked him about a sticker once or twice, but that he felt it was more joking than anything. [Tr. 191-92]. Mr. Lee denied asking employees if they wanted stickers. [Tr. 446]. In addition, Mr. Lloyd conceded that he talked with Mr. Workman and Lee almost every day ever since he started working for the Company such that it was not unusual for him to talk with those individuals – even before the election campaign started. [Tr. 226-27]. The requests occurred on the plant floor and there was absolutely no evidence of coercion.

2. Mistakes of Law

The ALJ erred in finding a violation via the no means no stickers because there was no evidence of coercion. Even if an isolated supervisor had participated in distributing no means no stickers, this alone is insufficient to establish a violation. *See Philips Industries, Inc.*, 295 NLRB 717, 733 (1989) (holding that where a supervisor distributed company shirts and there was "no evidence of coercion on employees," General Counsel could not establish an 8(a)(1) violation); *Wm. T. Burnett & Co.*, 273 NLRB 1084, 1092-93 (1984) (finding no 8(a)(1) where a supervisor gave pro-company buttons to employees when the supervisor did not monitor whether the employees in fact chose to wear them); *Daniel Construction Co.*, 266 NLRB 1090, 1100 (1983) (when supervisors solicited employees to purchase pro-company jackets, no 8(a)(1) violation because there was no evidence the supervisors were tracking employee union views); *McIndustries, Inc.*, 224 NLRB 1298 (1976) (finding that where a supervisor distributed and even pinned anti-union buttons on employees who did not object, no 8(a)(1) because no evidence of coercion); *Jefferson Stores, Inc.*, 201 NLRB 672, 673 (1973) (no 8(a)(1) where supervisors distributed anti-union cards).

Instead, distribution must be accompanied by ***coercive conduct***. *Wm. T. Burnett & Co.*, 273 NLRB 1084, 1093 (1984). The ALJ in the case at hand concluded that the ultimate question is "whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." [ALJ 8].

Here, even if there was an isolated instance where a low level supervisor asked an employee if they wanted a sticker, the evidence shows conclusively that there was no coercion

involved. Mr. Lloyd said he was only approached once or twice and even he thought it was done in a joking manner by a supervisor he chatted with all the time. Mr. Nickerson said under oath he never felt threatened. Mr. Garcia could barely remember being asked about a sticker and could not remember the person's last name who allegedly asked him. Garcia was not even asked any questions that would place the situation in context and provided no testimony or evidence about coercive conduct.

In fact, the ALJ looked at Mr. Garcia's "scant testimony" regarding another section of the Complaint. [ALJ 9]. She wrote, "Respondent asserts that there is simply no evidence whatsoever of any coercion or other evidence of unlawful interrogation based on this scant testimony. ***Respondent's argument has merit.***" [ALJ 9].

Tellingly on this point, the ALJ did not distinguish the Company's citation to *Acute Systems, Ltd.*, 214 NLRB 879 (1974). In that case, the Board did not find a violation even though the company's ***president*** pinned an antiunion button on an employee and another company supervisor distributed a pro-company pin to an employee upon request during the lead-up to an election. No Section 8(a)(1) violation was found because "the distribution of such graphic materials for display by employees does not contravene Section 8(a)(1) if the distribution is unaccompanied by 'coercive' conduct." General Counsel could not establish 8(a)(1) violation).

J. There are no "Bumping Rights" at Issue

The ALJ erred when ascribing antiunion motive to the Company when none of the terminated team leaders were given an opportunity to accept a demotion and "bump" back from a management position to an hourly position. [ALJ 21]. The ALJ conceded that the "Bumping Procedure" policy in the employee handbook by its express terms and as verified by testimony of

the plant manager Mr. Luckie, only applies on moves from ***shift to shift*** and not in cases of termination. [ALJ21].

Mr. Luckie confirmed that it is the Company's position that the policy only applies on moves from shift to shift. [Tr. 431-32]. That is precisely how the Company has applied the policy as well. Mr. Luckie confirmed that in the entire time he has been Plant Manager, there has never been a case where a Team Leader has been allowed to "bump" a production employee. [Tr. 432]. His testimony was very clear:

> Q And, Mike, to make sure I'm clear on this, are you aware of any instance where a Team Leader has been selected for termination, and you've allowed them to accept a demotion and stay in the plant?
>
> A No.
>
> Q And why don't you do that?
>
> A I just -- it's just not a good process for the floor. I mean, if you've got -- I call my Team Leaders -- I mean, it's -- I call them -- they're like supervisors to me. It's just not a good mix. They have information that other employees don't have on the floor. The pay cut -- it's just -- it's not a good mix. It's not good for morale. it's not good for the employees on the floor.

[Tr. 434-35].

Other management employees who had been selected for reduction or termination had asked to be allowed to accept a demotion and "bump" a production employee. Each and every time that happened, Mr. Luckie denied the request and handled it in the exact same manner he did in the present case. [Tr. 435-36].

The ALJ clearly erred when taking into consideration as part of her liability determination that the team leaders were not offered the chance to "bump" from a management to an hourly production position.

K. The Company would have taken the same Action

The ALJ erred when she failed or refused to consider the Company's evidence that it would have taken the same action at issue in the case and thus avoid liability. [ALJ 22].

Again, the Company has established above that the reduction in force of the three team leaders at issue was part of an ongoing effort to align the staffing at the Arlington plant with comparable facilities throughout the Company. This process started long before the union ever filed their petition for election. Indeed, at least two other Team Leader positions and three salaried positions had been eliminated as part of this ongoing process ***before*** the election petition was ever filed, no new hires have been made for six months before the terminations at issue here and since then, and the Company has continued to make reductions until today.

The three employees were not singled out based on engaging in alleged protected activity. Rather, the Company based its staffing reduction decision on legitimate, nondiscriminatory reasons - seniority and redundancy. The Company eliminated the least senior Team Leader on each shift and eliminated the IT Team Leader because there is already an IT manager and much larger operations are staffed with just one IT employee.

L. The ALJ Erred Regarding Sections 7(f)(i) and (iii) of the Complaint

The ALJ erred when she concluded the Company unlawfully interrogated one employee and promised unspecified benefits to that same employee as alleged in Sections 7(f)(i) and (iii) of the Complaint. The conversation relied upon to find the violation took place ***after*** the election was already concluded and therefore could not be reasonably found to be coercive.

The only employee to testify on this issue was Raul Castaneda. On cross-examination, he confirmed that he voluntarily initiated both of those conversations. He said, "I went into his

office for other problems" involving accidents with his fork lift. [Tr. 311-12]. There was absolutely no testimony of coercion by Mr. Luckie.

Further, the ALJ erred when she held that Mr. Castaneda had "two conversations" with Mr. Luckie before the election. The second conversation was after the election. [Tr. 307, "Q. When was the second time? A. After the union, after the -- Q. After the election? A. Yes. ***After the election***"]. (emphasis added).

Mr. Castaneda did not offer many details about the first conversation. He said only, "He [Mr. Luckie] said – he asked me how I felt, and I told him my opinion about it. I didn't know about the union." [Tr. 306]. There is no evidence of interrogation or coercion in that scant testimony.

As acknowledged by the ALJ, the allegedly offending comments by Luckie did not take place until the second conversation. [ALJ 11, Tr. 308]. Because the uncontested evidence is that the second conversation was after the election, no violation can be found.

In addition, not all questions posed to employees regarding union activity constitute unlawful interrogation. The test is whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Rossmore House*, 269 NLRB 1176, 1177 (1984). "The vice of unlawful interrogation lies not in the question alone but in any suggestion inherent from all the surrounding circumstances that the employer seeks to collect information for use in fashioning future reprisals or other acts of overt interference directed at employees for exercising their Section 7 rights." *Nortech Waste*, 1996 NLRB LEXIS 809, *14 (NLRB Dec. 6, 1996).

Courts and the Board have rejected claims on very similar facts. In *Baptist Medical System*, 876 F.2d 661 (8th Cir. 1989), a Director of Nurses told an employee that the company

had received complaints that the employee had been infringing on other employees' free time by passing out union literature in the cafeteria. The Director then asked the employee why she was pro-union and what problems she had with the hospital, questions which are much more direct than alleged here. The Eighth Circuit Court of Appeals reversed an ALJ finding that the question was unlawful, noting that the conversation was not coercive or threatening. The Court further noted that the "ALJ's cavalier disregard of the constitutional guarantee of freedom of speech renders meaningless that constitutional guarantee." *Id.* at 666. *See also NLRB v. Acme Die Casting Corp.*, 728 F.2d 959, 962 (7th Cir. 1984) ("It would be untenable, as well as an insulting reflection on the American worker's courage and character, to assume that any question put to a worker by his supervisor about unions, whatever its nature and whatever the circumstances, has a tendency to intimidate, and thus to interfere with concerted activities in violation of section 8(a)(1)." *See also Nortech Waste*, 1996 NLRB LEXIS 809, *14-15 (1996), wherein the ALJ held that "I reject the General Counsel's far fetched contention that [a supervisor] was engaged in polling employees when she asked why they wanted a union...[The supervisor's] question lacks that information gathering quality at the core of the prohibition against interrogating employees about union activity as it was 'not phrased in a way reasonably to indicate a purpose of learning the number of union supporters, the names of leaders, or similar information.'" *Id.* (emphasis added).

M. The ALJ Erred by Failing to Consider Rainey's Ulterior Motives

The Company presented ample evidence that Mr. Rainey had an axe to grind with the Company generally and with his supervisor Joe Lee specifically. The ALJ erred in failing or refusing to consider this uncontested evidence undercutting Rainey's credibility.

Rainey had been disciplined four times and suspended for three days by the same lower level supervisor (Joe Lee) he claimed gave him "the finger." Mr. Rainey admitted to having a poor relationship with Mr. Lee and that he had been written up by him numerous times before the union campaign ever started. [Tr. 93-95]. He testified in part as follows:

> Q. Well, hold on one second. The statement also says in here that you indicated there were four times when Joe Lee had tried to write you up. Correct?
>
> A. Uh-huh.
>
> Q. Is that fair?
>
> A. Yes. To my knowledge.
>
> Q. And then you indicated your last discipline occurred sometime in June of 2010. "This was before I called the union." Right?
>
> A. Yes. To my knowledge, uh-huh.
>
> Q. So your relationship with Joe Lee was strained even before you talked to the union. Right?
>
> A. Yes.

[Tr. 99].

The ALJ erred by not considering this evidence when assessing Rainey's credibility.

IV. Conclusion

For all of the foregoing reasons, Respondent Flex-N-Gate Texas, LLC, respectfully submits that the ALJ's findings and conclusions as referenced above were in error and should be reversed and that the Board should find that Flex-N-Gate did not engage in any unfair labor practices under the National Labor Relations Act. As such, Respondent respectfully prays for judgment in Respondent's favor on all counts and claims set forth in the Complaint, that Charging Party take nothing by way of the Complaint, and for all other just and proper relief.

Respectfully submitted,

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STATEMENT OF SERVICE

This is to certify that I have served a true and correct copy of the foregoing upon the following person, by first class mail:

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This 25th day of January, 2012.

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